Lectures on Arbitration

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Arbitrating Japanese-Africa Commercial and Investment Disputes[3]

A. Introduction

Nairobi is an excellent choice for such a conference if only because the country is in a hurry to develop. The on-going construction is driven by arrears of investment and infrastructure as well as the discovery of new resources. Africa's youths expect and deserve development which is sustainable and equitable. Some of whom are used to the internet, instant coffee and online dating. They cannot understand that just a few years ago in Japan and Africa even getting the name of a girl or boy from a neighbouring village, let alone whether or not she would look your way, used to take the concerted espionage of friends and aunties. The youth expect and deserve development which is sustainable and equitable.

Most investments and commercial transactions run without any serious disputes because both parties benefit in the long run. Disputes arise when one or both sides feel short-changed. The availability of reliable and timely mechanisms to resolve disputes is a great boost to

3 Paper prepared for presentation in the Sixth Tokyo International Conference on African Development (TICAD Vi) on 27-28th August 2016, Nairobi, Kenya. The theme of the conference was 'Advancing Africa's Sustainable Development Agenda- TICAD Partnership For Prosperity'.

both investor confidence and long-term stability of the investment and the relationship.

This is a brief overview of the systems in place for resolving commercial and investment disputes out of court, through arbitration, with specific reference to the Japanese Government and private investors on one hand and Africa on the other hand.

B. The Case for Arbitration

Arbitration is defined as the resolution of disputes out of court through an independent tribunal, whose decision is final and binding. The tribunal is normally made up of one or three people.

The advantages of arbitration over litigation are well documented. However, one aspect is worthy of highlighting foreigners' legendary abhorrence of courts in host states.

Foreign investors are very apprehensive of taking their disputes to courts in host countries, especially when the host state is the perceived offender. The host state is the lawmaker, law enforcer, the prosecutor, the judge, and the executioner. In some cases, it is also the lawbreaker. That is the case regardless of whether the host state is in Africa, Asia, Europe, America or Australia. The power and multiplicity of roles played by states and the fact that states exert a measure of sympathy or control over their courts make the foreigners wary of such courts.

The mistrust of national courts in host states is universal. It is neither ancient nor transient. It is not even restricted to

courts in third-world states. For example, a press release from the European Union (EU) dated 26 September 2014 on the negotiation of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) acknowledges that,

> "The fact that a country has a strong legal system does not always mean the law will protect foreign investors from discrimination by the government. Although the EU and Canada are developed economies, companies can still come across problems affecting their investments which domestic courts systems are not always able to deal with effectively".[4]

One feature of all modern arbitration law is the statutory insulation of arbitration from national courts' interference. Compare the two provisions below:

> "With respect to arbitral proceedings, no court shall intervene except where so provided in this Law. Article 4". (Arbitration Law, No.138 of 2003 of Japan.)

> "Except as provided in this Act, no court shall intervene in matters governed by this Act". (Arbitration Act of Kenya 1995 s. 10)

An arbitration between private parties is generally referred to as "commercial". A commercial arbitration takes place if the contract between the parties provides for the resolution of certain or all disputes through arbitration.

4 http://europa.eu/rapid/press-release_MEMO-14-542_en.htm

When the dispute being arbitrated is between a foreign investor and a host state, especially if the relationship is the subject of a Bilateral Investment Treaty (BIT), this is considered an "investment arbitration". The consent to arbitrate is found in provisions of the treaty (BIT) between the host state and the state of the investor.

Prof. Gary Born[5] has proposed a new hybrid model, the Bilateral Arbitration Treaty (BAT), which would put an obligation on commercial entities from the contracting countries to refer their disputes to arbitration even when there are no BITs or contractual requirements to arbitrate disputes.

C. UNCITRAL

UNCITRAL is an acronym for the United Nations Commission on International Trade Law, which is a subsidiary body of the General Assembly of the United Nations. It is the core legal body of the United Nations system in the field of international trade law. Its mandate extends to the modernisation and harmonisation of rules on international business. It has developed a modern, fair Model Arbitration Law (MAL), which is a template law for states to adopt either in total or with minimal changes.

The main principles of MAL are:

- Creation of a special regime for international commercial arbitration by providing for substantive and territorial scope of application.

5 BITS, BATS and Buts: Reflections on International Dispute Resolution https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/News/Documents/BITs-BATs-and-Buts.pdf

- Limiting the scope of involvement of national courts in matters that are subject to arbitration, except where court assistance or supervision is specifically provided for.
- Jurisdiction of an arbitral tribunal to rule on its own jurisdiction.
- Power to order interim measures.

Japan adopted the MAL with effect from 1st March 2005, becoming the 45th state to do so. Ten African countries have adopted MAL: Nigeria (1990), Tunisia (1993), Egypt (1994), Kenya (1995), Zambia (1996), Madagascar (1998), Uganda (2000), Zambia (2000), Mauritius (2008) and Rwanda (2008)[6]. The Uniform Arbitration Act, which operates in OHADA, an organisation of 17 mainly Francophone African countries, has some MAL provisions but is not based on MAL. The arbitration law in the rest of Africa is based on non-MAL arbitration laws or purely anchored in Civil Procedure Rules.

D. Corruption

Both Kenya and Japan have added some anti-corruption provisions which are not in MAL. The Arbitration Act of Kenya introduced through 2010 amendment a provision that an arbitration award that has been induced or affected by fraud, bribery, undue influence, or corruption would not be enforced[7].

6 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

7 Kenya Arbitration Act 1995 s. 35.(2).(vi)

The Japanese arbitration law takes a zero-tolerance approach by imposing imprisonment and fines for anyone including the arbitrator[8] involved in corruption with respect to arbitration.

E. The New York Convention 1958

The full name is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It facilitates the recognition and enforcement of arbitration awards in countries other than the ones in which the awards were made. Obviously, this is a very important treaty, given the global nature of trade and investment entities. Led by Egypt and Morocco, in which the convention entered into force in 1959, all the other African countries, apart from about 16, are signatories to the convention. The convention entered into force in Japan in 1961.

F. Bilateral Investment Treaties (BITs)

BITs are long-term treaties which are meant to promote investment between the contracting states.

The world's first BIT was signed on November 25, 1959, between Pakistan and Germany. There are currently over 3500 BITs in force, involving most countries in the world[9].

Japan has 27 Bilateral Investment Treaties (BITs), of which only 2 are with African states – Egypt with effect from 14th January 1978 and Mozambique effective 29th August

8 Japan Arbitration Law, Articles 50 - 55

9 https://en.wikipedia.org/wiki/Bilateral_investment_treaty

2014.[10] China has signed 30 BITs with African states 18 of which are in force.

The anatomy of the 23-page BIT between Japan and Mozambique[11] below reveals the contents of a typical BIT:

Article 1 – Definitions: Terms such as: investment, investor, investment activity are defined.

Article 2.1 - National Treatment: Each Contracting Party shall in its Area accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords in like circumstances to its investors and their investments for investment activities.

Article 3.1 - Most-Favoured-Nation Treatment: Each Contracting Party shall in its Area accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords in like circumstances to investors of a non-Contracting Party and their investments for investment activities.

Article 4.1 - General Treatment: Each Contracting Party shall in its Area accord to investments of investors of the other Contracting Party treatment under international law, including fair and equitable treatment and full protection and security.

Article 12.1 - Expropriation and Compensation: Neither Contracting Party shall expropriate or nationalise

10 http://investmentpolicyhub.unctad.org/IIA/CountryBits/105#iiaInnerMenu

11 http://investmentpolicyhub.unctad.org/Download/TreatyFile/3114

investments in its Area of investors of the other Contracting Party or take any measure equivalent to expropriation or nationalisation (hereinafter referred to as "expropriation") except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) upon payment of prompt, adequate and effective compensation pursuant to paragraphs 2, 3 and 4; and (d) in accordance with due process of law and Article 4.

Article 12.2 – Bases of Compensation: The compensation shall be equivalent to the fair market value of the expropriated investments at the time when the expropriation was publicly announced or when the expropriation occurred, whichever is the earlier. The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier.

Article 16.2 – Disputes Between Contracting States: Any dispute between the Contracting Parties as to the interpretation and application of this Agreement, not satisfactorily adjusted by diplomacy, shall be referred for decision to an arbitration board. Such arbitration board shall be composed of three arbitrators, with each Contracting Party appointing one arbitrator within a period of thirty days from the date of receipt by either Contracting Party from the other Contracting Party of a note requesting arbitration of the dispute, and the third arbitrator to be agreed upon as President by the two arbitrators so chosen within a further period of thirty days, provided that the third arbitrator shall not be a national of either Contracting Party.

Article 17.4 - Investment Disputes (Between a Contracting Party and an Investor of the Other Contracting Party):

If the investment dispute cannot be settled through... consultations within three months from the date on which the disputing investor requested in writing the disputing Party for consultations, the disputing investor may... submit the investment dispute to one of the following international arbitrations:

(a) arbitration under ICSID so long as the ICSID Convention is in force between the Contracting Parties;

(b) arbitration under ICSID Additional Facility Rules provided that either Contracting Party, but not both, is a party to the ICSID Convention;

(c) arbitration under the Arbitration Rules of the UNCITRAL.

(d) if agreed with the disputing Party, any arbitration in accordance with other arbitration rules.

Egypt takes the continental crown with over 70 BITs in force, according to UNCTAD. Kenya has signed 15 BITs. The only five which have entered into force are with European states – France, Germany, Italy, Netherlands, Switzerland, and the United Kingdom.

G. ICSID

Japan and many African states are contracting states of the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, March 18, 1965. This provides a permanent mechanism for resolving investment disputes.

H. Conclusion

Japan and many African states have not only signed BITs but also embraced the international best practice in arbitration and signed the necessary multilateral treaties to facilitate the resolution of any dispute arising through arbitration and for the enforcement of the awards.